

CIVIL AND COMMERCIAL
MEDIATION IN EUROPE

National Mediation Rules
and Procedures

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PORTUGAL

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1. INTRODUCTION

1.1. CONCEPT, ORIGIN, EVOLUTION AND CURRENT SITUATION OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS IN PORTUGAL

Mediation is a known legal figure under Portuguese law. In fact, mediation is not only legally defined¹ but is also the object of profuse doctrinal studies².

¹ A legal definition for Mediation can be found in Article 35 of Law No. 78/2001, 13 July — ‘Mediation is a non-judicial instrument with private, informal, confidential, voluntary and non-litigious nature for the resolution of disputes, in which the parties, by their active and direct contribution, are aided by a mediator to find by themselves a negotiated and friendly solution for the conflict’ — and in Article 4 of Law n. 21/2007, 12 June (concerning Criminal Mediation): ‘Mediation is an informal and flexible process, conducted by an impartial third party, the mediator, who promotes an understanding between the defendant and the victim and tries actively to find an agreement allowing the reparation of the damages caused by the wrongful act and contributing to the restoration of social peace’.

² Not suggesting a doctrinal definition for mediation, vide P. COSTA E SILVA, *A nova face da justiça – os meios extrajudiciais de resolução de controvérsias*, Coimbra Editora, Lisboa, 2009, pp. 43 ff. Proposing a concept for mediation, cf. D. MOURA VICENTE, ‘A Directiva sobre a Mediação em Matéria Civil e Comercial e a sua Transposição para a Ordem Jurídica Portuguesa’, *Estudos em Homenagem ao Professor Doutor Paulo de Pitta e Cunha*, Vol. III, Almedina, Coimbra, 2010, p. 100: ‘Voluntary process through which parties, with the assistance of one or more third parties deprived of decision-making powers, try to reach an agreement in order to put an end to a dispute. [...] It is a dispute resolution mechanism based

In Portugal, mediation is an alternative dispute resolution (ADR) device that exists not only as a private means for solving disputes but is also integrated within the public jurisdictional system. Indeed, this can be observed in two main features established by Portuguese law: on one hand, there are public mediation services, which organise lists of mediators and provide all the logistic support for mediation. On the other hand, there is a network of informal courts (Julgados de Paz), the procedure of which involves mediation.

The Julgados de Paz (‘Courts for the Peace’) are informal public courts established with local authorities, which solve disputes by alternative means and rules. Parties can freely submit civil disputes with a value inferior to € 5000 (excluding family and succession disputes) to a Court for the Peace³. Each Court for the Peace is formed with a Judge (who does not decide exclusively by legality

entirely on the will of the parties. They can put an end to it at any time, which is not possible in arbitration. Mediation is, therefore, a mean for auto-settling disputes, although with the assistance of a third party’; J.P. REMÉDIO MARQUES, *Acção Declarativa à Luz do Código Revisto, 2.ª Edição*, Coimbra Editora, Coimbra, 2009, p. 42: ‘Mediation constitutes a method where, occurring a dispute, the parties use self-composition structures for solving the content; the outcome is the product of the power of self-determine of the parties, even when the solution is achieved with help of a third party, the mediator. The dispute solution is, therefore, friendly and consensual’; L. DIAS VARGAS, *Julgados de Paz e Mediação: uma nova face da justiça*, Almedina, Coimbra, 2006, p. 55: ‘Mediation is a proceeding intended to provide dialogue, investigation of problems and its motivations, so that the parties may clearly understand the conflict and the interests to be satisfied. When identified a common aspect of the dispute, the parties can work together into an agreement, which settles the quarrel in an acceptable and lasting way’; R. MARTINGO CRUZ, *Mediação Familiar: Limites Materiais dos Acordos e o seu Controlo pelas Autoridades*, Coimbra Editora, Coimbra, 2011, p. 32: ‘In Mediation, as conciliation and negotiation, there is cooperation between the parties and they control the procedure. Beyond the control of the parties in all the process, there is also the confidentiality, celerity and the cost economy’; S. FIGUEIREDO BANDEIRA, ‘A mediação como meio privilegiado de resolução de litígios’, *Julgados de Paz e Mediação: um novo conceito de justiça*, Associação Académica da Faculdade de Direito de Lisboa, Lisboa, 2002, p. 116: ‘Mediation is an extrajudicial resolution of disputes method of private, informal, confidential, non-adversarial, voluntary and non-contentious nature, where the parties, with their active and direct participation, are aided by a mediator that only takes responsibility for getting them closer and helping them find themselves a negotiated and friendly solution to the conflict’; A. SOARES DA COSTA E M. SAMÚDIO LIMA, ‘Julgados de Paz: Análise do Regime Jurídico’, *Julgados de Paz e Mediação: um novo conceito de Justiça*, Associação Académica da Faculdade de Direito de Lisboa, Lisboa, 2002, p. 230: ‘Mediation is a non-judicial mean of solving disputes, alternative to Court. Its main goal is to provide parties the possibility of solving their contents in a friendly way. The mediator, in cooperation with the parties, conducts the mediation process. Mediation has a private, informal, confidential, voluntary and non-litigious nature’.

³ It is firm that the competence of Courts for the Peace is not exclusive: the common Courts are also competent for the disputes admissible in Courts for the Peace. Ruling of the Supreme Court of Justice n. 11/2007, 24 May 2007. Controversial is the question whether the accused may refuse to be judged in a Court for the Peace and demand the cause submission to a common court. Cf. M. TEIXEIRA DE SOUSA, ‘A competência dos julgados de paz: a alternativa consensual – Anotação ao Acórdão de Uniformização de Jurisprudência n. 11/2007, de 24 mayo 2007, proc. 881/2007’, *Cadernos de Direito Privado*, N. 22 (Abril/Junho), 2008, p. 57.

criteria) and Mediation Services. Once a cause is started, a Pre-Mediation Session takes place, which will explain the mediation process to the parties and check their eligibility for solving their dispute by mediation. In this session, parties will decide if they want to try to settle their cause using mediation or if they will assign the dispute to the Judge. If they opt for mediation, they shall choose one mediator from public lists available (if not, the Court for the Peace will assign one authorised mediator), knowing that they can quit at any time. In the event of quitting the mediation proceedings (or not accepting the use of mediation), the Judge for the Peace shall decide the cause and his or her ruling is enforceable.

1.2. GOVERNING RULES AND LEGAL SOURCES OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS IN PORTUGAL: THE IMPLEMENTATION OF DIRECTIVE 2008/52/EC

1.2.1. *Legal basis for mediation*

The Portuguese Constitution establishes mediation⁴ and Portuguese legislation – applicable both to international and to internal disputes – fully complies with Directive 2008/52/EC.

Therefore, if authorised mediation services are used prior to any civil dispute, limitation and prescription periods are suspended until the success or failure of mediation (Pre-Judicial Mediation – Article 249-A of the Civil Procedural Code⁵). Further, even after a judicial dispute has commenced, Civil Courts can halt the proceedings and refer the case to Mediation Services – public or private (Article 279-A of the Civil Procedural Code⁶).

The mediation settlement is enforceable in court (Article 46 Civil Procedure Code⁷). Concerning pre-judicial mediation, if parties should so wish, the Civil

⁴ In fact, Article 202, n. 4, of the Portuguese Constitution (concerning the Jurisdictional Function) establishes ‘The law may create instruments and devices for non-judicial resolution of conflicts’, and Article 209 n. 2 (concerning categories of Courts) ‘The law may create maritime courts, arbitral courts and courts for the peace’.

⁵ Article 249-A Portuguese Civil Procedure Code: ‘1 – The parties may, prior to submission of any dispute in Court, apply to mediation systems for resolving such disputes. 2 – The use of pre-judicial mediation systems approved by the Minister of Justice shall suspend the limitation and prescription periods from the date it is requested the intervention of a mediator’.

⁶ Article 279-A, n. 1, Portuguese Civil Procedure Code: ‘At any stage of the cause, and whenever deemed appropriate, the judge may refer the case to mediation, suspending the proceedings, unless either party expressly opposes such a referral’.

⁷ Article 46 Portuguese Civil Procedure Code: ‘The execution proceeding shall be based on: [...] b) Public or authenticated documents, importing the establishment or recognition of any

Court shall ratify the mediation settlement, certifying its compliance with applicable legislation⁸.

Portuguese law adopts a monistic approach, applying the same mediation rules both to national and cross-border disputes. In consequence, Portuguese courts, when solving international disputes – even under foreign substantive law –, can refer the cases to mediation proceedings, suspending the judicial disputes.

Additionally, public mediation services are also available for international disputes: Courts for the Peace are established as Courts and can be used whenever there is international competence of the Portuguese judiciary system; Public Mediation Services (specialised and within Courts for the Peace) can be used by the parties, even though there are connections to other legal systems.

1.2.2. *Public mediation services*

Along with general rules for mediation, Portuguese legislation establishes, on one hand, three public mediation services; on the other hand, a network of informal courts that involve mediation services, useable within the court’s procedure or as a public service available to disputing parties.

1.2.2.1. Public Mediation Services

There are now 3 public specialised mediation services: Family Mediation, Labour Mediation and Criminal Mediation.

1.2.2.2. Julgados de Paz (Courts for the Peace)

These courts⁹ have jurisdiction for the majority of civil disputes with a value inferior to € 5,000, the procedure of which involves mediation. Additionally, their public mediation services may be used in any dispute – as long as it does not handle rights and obligations that are not at the parties’ disposal – even if there is no jurisdictional competence of the Court for the Peace¹⁰. This means that mediation services established in a Court for the Peace are usable for almost any dispute.

obligation; c) Private written documents, signed by the debtor, importing the establishment or recognition of pecuniary obligations, which amount is determinable by simple arithmetic calculation in accordance with its provisions, or the obligation to hand over something or to perform an action’.

⁸ Article 249-A, n. 3, Portuguese Civil Procedure Code: ‘The judicial ratification of the agreement reached in pre-judicial mediation is intended to verify its compliance with legislation’.

⁹ Its rules are mainly in Law No. 78/2001, 13th July, and in Decree (Portaria) of Ministry of Justice n. 1112/2005, 28th October.

¹⁰ Article 14 Decree of Ministry of Justice No. 1112/2005, 28th October.

1.2.3. *Effects of mediation and compliance of Directive 2008/52/EC*

Mediation existed in Portugal before the implementation of Directive 2007/52/EC, as the 1966 Portuguese Civil Code expressly admits the transaction contract – a ‘contract by which the parties prevent or end a dispute through reciprocal concessions’¹¹ –, which is formally valid if concluded on written document and leads to the end of a judicial dispute¹². Also, there are local courts (Courts for the Peace) that involve mediation services. Additionally, any Court shall begin a dispute resolution with an attempt at conciliation.

However, Portuguese law did not achieve, until 2009, some of the obligations of the Directive – the suspension of the limitation and prescription periods, the possibility of suspending judicial disputes with the purpose of using mediation services and the confidentiality of the mediation process. Therefore, Law n. 29/2009 of 29 July established these amendments to the Portuguese Civil Procedure Code finalising the correct transposition of Directive 2008/52/EC.

Furthermore, it is possible to emphasise three instances of Portuguese legislation going beyond the objectives prescribed by the Directive.

First, it must be noted that the settlement resulting from mediation is enforceable (Article 46.º of the Portuguese Civil Procedure Code), even if it is written in a private document¹³; the Directive on the other hand only demanded the possibility of requesting exequatur from a Court or a Notary¹⁴.

¹¹ Cf. Article 1248 Portuguese Civil Code. However, it is forbidden to use this mechanism over rights and obligations, which are not at the parties’ disposal (Article 1249 Portuguese Civil Code).

¹² Cf. Portuguese Civil Procedure Code, Article 293 (‘It is permitted to the parties, in any instance, to compromise on the cause’), Article 287 (‘The dispute ends by: [...] d) The withdrawal, confession or transaction.’), Article 300 (‘The confession, withdrawal or transaction may be achieved by authentic public document or private written document, according to the formal requirements of substantive law’).

¹³ Article 46 Portuguese Civil Procedure Code: ‘The execution proceeding shall be based on: [...] b) Public or authenticated documents, importing the establishment or recognition of any obligation; c) Private written documents, signed by the debtor, importing the establishment or recognition of pecuniary obligations, which amount is determinable by simple arithmetic calculation in accordance with its provisions, or the obligation to hand over something or to perform an action’.

It will be seen further that the mediation settlement is mandatorily submitted to written form, according to Article 1250 Portuguese Civil Code: ‘Notwithstanding the provisions of special laws, the preventive or non-judicial transaction must be formalised on public document or authenticated private document, when it can derive some purpose for which one of these forms is required, or on written document, in other cases’.

¹⁴ Article 6 of Directive 2008/52/EC.

Secondly, all content of mediation sessions is confidential and cannot be used in Court¹⁵; the Directive only prescribes the confidentiality of information arising out of or in connection with a mediation process. Thirdly, the mediation regime is applicable not only to cross-border disputes (as was prescribed by Article 2 of the Directive) but to all disputes.

Nevertheless, it is possible to identify a problem arising from the Portuguese legislation, concerning the compliance of European law: the suspension of limitation and prescription periods in pre-judicial mediation only occurs when using mediation systems approved by the Government¹⁶. Therefore, even though it is possible to use an ad hoc mediator (because any agreement between parties is enforceable and will cease the dispute), it shall not cause the time suspension effect and, in consequence, will not successfully prevent judicial litigation¹⁷.

The Portuguese Government, though, approved all public mediation services as well as ‘mediation services of other Member States, as long as they are legally recognised in the legal system where they belong’¹⁸. This means that foreign mediators will not need approval for achieving the limitation and prescription period suspension effect.

1.2.4. *Areas of law and issues in which mediation is available*

Private mediation is available to end any kind of dispute, except over rights and obligations that are not at the parties’ disposal¹⁹.

The public mediation services are available for selected disputes:

- 1) Family mediation services²⁰ may be used for solving quarrels concerning parental responsibility, divorce and separation, alimony (spousal support),

¹⁵ Article 249-C Portuguese Civil Procedure Code: ‘Except for the agreement, the content of mediation sessions is confidential and cannot be used as evidence in court, except in exceptional circumstances, in particular the protection of physical or psychological integrity of any person’.

¹⁶ Article 249-A of the Portuguese Civil Procedure Code: ‘The use of pre-judicial mediation systems approved by the Minister of Justice shall suspend the limitation and prescription periods from the date it is requested the intervention of a mediator’.

¹⁷ This difficulty will not arise in the cases where mediation is used after a judicial action is running; in this case, the limitation and prescription periods will be suspended, even if the mediator is not from the approved mediation systems. Cf. Article 279-A of the Portuguese Civil Procedure Code.

¹⁸ Article 3, Decree of Ministry of Justice No. 203/2011, 20 May.

¹⁹ Article 1248 Portuguese Civil Code: ‘Transaction is a contract by which the parties prevent or end a dispute through reciprocal concessions’; Article 1249 Portuguese Civil Code: ‘The parties cannot compromise over rights and obligations which are not at the parties’ disposal, nor about illicit contracts’.

²⁰ Article 4 Decree of the Secretary of State of Justice No. 18 778/2007, 13 July.

- child support, parental support and authorisation for using family names. Additionally, the employment of mediation as an ADR device may be inducted: before any divorce procedure (in Court or in a Civil Registry Office), parties are informed of the existence and purposes of family mediation services²¹; in judicial cases regulating parental responsibilities, the Court may transmit the cause to mediation services²².
- 2) Labour mediation services are available for any dispute between employers and workers, (excluding quarrels related to work accidents or rights and obligations that are not at the parties' disposal)²³ and for collective labour conflicts²⁴.
 - 3) Criminal mediation services are available for private crimes²⁵ and semi-public crimes²⁶ committed against persons or patrimony, excluding crimes punishable with more than 5 years imprisonment, sexual crimes, peculation, corruption, crimes committed against victims under 16 years old and crimes submitted to summary forms of criminal procedure²⁷.
 - 4) Justice for the Peace mediation services may be used, on the one hand, whenever there is competence of those courts – there is a list of civil disputes with a value inferior to € 5.000 which may be solved in these informal courts, which involve mediation in its procedure²⁸: actions to enforce obligations (except where the creditor is or was a corporation); actions to enforce the delivery of mobile property; disputes related to condominium regimes; disputes between land owners related to passage, waters, windows, trees and constructions; land property actions; contractual and non-contractual liability; restitution in damages for some criminal offenses. On the other hand, mediation services of the Courts for the Peace can be used for any other disputes, even if the Judge of the Peace would not have competence²⁹.

²¹ Article 1774 Portuguese Civil Code: 'Before the beginning of divorce proceedings, the Civil Registrar or the Court must inform the spouses of the existence and objectives of family mediation services'.

²² Article 147-D OTM: 'At any stage of the cause and whenever it is considered appropriate, in particular on parental responsibility regulation, the Judge may determine the intervention of public or private mediation, ex officio with the consent of the parties, or at their request'. In this case, mediation is free of any charge. Cf. Article 6 Decree of Secretary of State of Justice No. 18778/2007, 13 July.

²³ Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006.

²⁴ Article 526 of the Portuguese Labour Code.

²⁵ The private crimes are criminal offenses where the criminal procedure depends on complaint and private accusation by the victim.

²⁶ The semi-public crimes are criminal offenses where the criminal procedure depends on complaint by the victim.

²⁷ Law 21/2007, 12 July.

²⁸ Law n. 78/2001, 13 July; Decree of Ministry of Justice 1112/2005, 28 October.

²⁹ Article 16, n. 3, of Law No. 78/2001, 13 July.

2. OUT-OF-COURT MEDIATION

2.1. THE AGREEMENT TO MEDIATE

2.1.1. Form

Concerning the form of the agreement, Portuguese contract law is centred around the principle of freedom to choose any form³⁰. Therefore, if parties wish to use private mediation, they can agree to it by any form.

However, the request for public family mediation services and public labour mediation services depends on written form or electronic form on the internet (www.gral.mj.pt/); the use of mediation services in a Court for the Peace shall also be requested in writing. Additionally, in Justice for the Peace mediation services, there is one extra formality: prior to mediation, parties shall sign a confidentiality agreement, in writing³¹.

2.1.2. Content

The content of the agreement is not legally determined – parties can freely discuss the content of the mediation agreement; the law applicable shall be determined by the Rome I Regulation³².

2.1.3. Effects

A distinction must be drawn between an agreement that leads to private mediation and the pact to use public mediation services. In the first case, the contract will bind the parties to the terms they agree to; when using public mediation services, however, the parties compromise to be physically in mediation sessions, conserving the right to be accompanied by legal representatives³³. Additionally, parties have the right to quit mediation at any time³⁴. The agreement to mediate within public services will also imply the

³⁰ Article 219 Portuguese Civil Code: 'The validity of a contract is not dependent on observance of special form, except when the law requires it'.

³¹ Article 52 Law No. 78/2001, 13 July: 'The parties must sign, in advance, a mediation agreement, under which assume that mediation is confidential'.

³² Regulation (EC) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations.

³³ Article 10 Decree of Minister of Justice No. 1112/2005, 28 October; Article 7 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

³⁴ Article 55 Law No. 78/2001, 13 July; Article 12 Decree of Minister of Justice No. 1112/2005, 28 October; Article 4.º i) Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006; Article 10, b) Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

nomination of a mediator by public services (alphabetically chosen from the lists of mediators in that service)³⁵. However, in Courts for the Peace mediation services, it is possible for the parties to choose a mediator from the list³⁶.

In any case, the assigned mediator becomes obliged to be physically present in mediation sessions and to act as an impartial and independent participant, creating the conditions for parties to develop their own solution. He or she assumes the responsibility for organising and conducting the proceedings, asking questions and investigating the facts, so that parties may freely commit to a fair outcome of their content³⁷.

The mediation agreement will also affect national courts. If a judicial proceeding was already taking place, the proceeding is suspended until the end of the mediation procedure, for a maximum of 6 months³⁸.

Prior to a judicial dispute, the mediation agreement suspends prescription and limitation periods while the mediation takes place, as long as parties use an approved mediation service³⁹. The use of authorised mediation services can be proved to the court with a document issued by mediation services mentioning the parties' identification, the mediation object, the date of the mediation request, the result of the mediation process and its date⁴⁰. If a settlement is not accomplished, prescription and limitation periods resume at the moment the mediation process is stopped, which is stated by mediation services⁴¹. If a

³⁵ Cf. Article 2 Decree of Minister of Justice No. 1112/2005, 28 October; 4 of Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006; Article 6 of Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

³⁶ Article 3, n. 4, Decree of Minister of Justice No. 1112/2005, 28 October.

³⁷ Article 35 Law No. 78/2001, 13 July, and Article 16 Decree of Minister of Justice No. 1112/2005, 28 October (concerning Justice for the Peace Mediation Services); Article 7 Decree of the Secretary of State of Justice No. 18778/2007, 13 July (concerning Family Mediation System); Article 14 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January (Criminal Mediation).

³⁸ Article 279-A, n. 2, Portuguese Civil Procedure Code: 'Notwithstanding the preceding paragraph, the parties may agree to solve the dispute by mediation, deciding the suspension of judicial proceedings for the maximum period mentioned in paragraph 4 of the preceding Article'.

³⁹ Article 249-A Portuguese Civil Procedure Code: '1 - The parties may, prior to submission of any dispute in Court, apply to mediation systems for resolving such disputes. 2 - The use of pre-judicial mediation systems approved by the Minister of Justice shall suspend the limitation and prescription periods from the date it is requested the intervention of a mediator'. As seen before, the approved mediation services are the public mediation systems and the mediation services of other Member States, as long as they are recognised in the State of origin. Article 3 Decree of Ministry of Justice No. 203/2011, 20 May.

⁴⁰ Article 4 Decree of Ministry of Justice No. 203/2011, 20 May.

⁴¹ Article 249-A, n. 3 and n. 4 Portuguese Civil Procedure Code: '3 - The limitation and prescription periods resume the moment one of the parties refuses to continue the mediation process, as well as when the mediator determines the end of the mediation process. 4 - The lack of agreement and refusal to continue mediation referred in the preceding paragraph shall be upheld by mediation services'.

settlement is achieved, it means parties have made a transaction contract, which binds them and waives the contested rights. This settlement can also be proved by mediation services⁴².

The breach of a mediation agreement (by the parties or the mediator) amounts to contractual liability, in general terms. Furthermore, regarding public mediation services, parties shall answer to a satisfaction inquiry concerning the mediator's behaviour, which may lead to the exclusion of him or her from public lists⁴³.

2.2. THE MEDIATOR: SELECTION, TRAITS, FEES, CHALLENGE/RESIGNATION, CONFLICT OF INTERESTS/CODE OF CONDUCT, RELATION WITH OTHER ACTORS (MAINLY PARTIES)...

2.2.1. Selection

In private mediation, parties may choose any person as mediator, since there are no mandatory requirements. However, mediation performed by unofficial mediators will not suspend limitation and prescription periods⁴⁴. Portuguese Law appoints Public Notaries as adequate for private mediation services⁴⁵.

In public mediation services, a mediator will be assigned from public lists of chosen professionals, recruited by open tender and included in lists published in the official journal (*Diário da República*). There are legal requirements that must be fulfilled in order to apply to the public tenders⁴⁶: being over 25 years old; being in full possession of civil and political rights; having an adequate superior

⁴² Article 3 Decree of Ministry of Justice No. 203/2011, 20 May.

⁴³ Article 33.º Law No. 78/2001, 13 July and Article 19 Decree of Ministry of Justice No. 1112/2005, 28 October (Justice for the Peace mediation services); Article 9 Decree of Secretary of State of Justice No. 18778/2007, 13 July (family mediation services); Article 5 Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006 (labour mediation services); Article 12 and 18 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January (criminal mediation services).

⁴⁴ Article 249-A Portuguese Civil Procedure Code: 1 - The parties may, prior to submission of any dispute in Court, apply to mediation systems for resolving such disputes. 2 - The use of pre-judicial mediation systems approved by the Minister of Justice shall suspend the limitation and prescription periods from the date it is requested the intervention of a mediator.

As we've seen before, the approved mediation services are the public mediation systems and the mediation services of other Member States, as long as they are recognised in the State of origin. Article 3 Decree of Ministry of Justice No. 203/2011, 20 May.

⁴⁵ Article 4 m) of the Statute of Notaries (version of Law No. 15/2011, 25 January).

⁴⁶ Article 31 of Law No. 78/2001, 13 July; Regulations on selection of Mediators approved by Decree of Ministry of Justice No. 282/2010, 25 May, and Article 12 Law No. 21/2007, 12 June.

degree; having successfully completed a mediation training course approved by the Ministry of Justice; being an adequate person⁴⁷ and knowing the Portuguese language.

There is a list of mediators for each Court for the Peace⁴⁸, and for each centre of Family Mediation⁴⁹ and of Labour Mediation⁵⁰. Within the Court for the Peace mediation services it is possible for the parties to choose the mediator from the list.

2.2.2. Challenge and resignation; conflict of interests check

Within the Courts for the Peace mediation services, the disqualification regime of Judges in national courts is applicable⁵¹. Additionally, mediators included in the list of a Court for the Peace may not work as a lawyer in that Court for the Peace⁵²; the mediator of a case cannot intervene, in any way, in that dispute after the mediation (arbitration, judicial proceedings or psychological support⁵³) and cannot be witness in a judicial dispute between the parties connected with the mediation services he provided⁵⁴.

Within the remaining public mediation services, it is established that the mediator of a case cannot intervene, in any way, in that dispute after the mediation: arbitration, judicial proceedings or psychological support⁵⁵. Moreover, whenever the mediator does not assure his or her independence and impartiality – for legal, ethical or deontological reasons – he or she shall interrupt the mediation process and request his or her substitution⁵⁶.

In private mediation, there are no mandatory rules: parties may choose whomever they decide and there are no rules on resignation or challenge.

⁴⁷ Authors interpret this requirement as 'not having been convicted for intentional crimes'.

⁴⁸ There is a public network of Courts for the Peace in all national territory.

⁴⁹ There are 15 centres for Family Mediation: Almada, Amadora, Barreiro, Braga, Cascais, Coimbra, Leiria, Lisbon, Loures, Mafra, Oeiras, Oporto, Seixal, Setúbal and Sintra. Article 5 Decree of the Secretary of State of Justice No. 18778/2007, 13 July.

⁵⁰ There are 2 centres for Labour Mediation: Lisbon and Oporto.

⁵¹ Article 21 Law No. 78/2001, 13 July: 'Judges for the Peace and Mediators are submitted to the judicial disqualification (recusal) regime established in civil procedure law for the Judges'. Therefore, it is applicable the regime of the Portuguese Civil Procedure Code, Articles 125 to 136. Article 30, n. 3, Law No. 78/2001, 13 July.

⁵² Article 17, n. 2, Decree of Minister of Justice No. 1112/2005, 28 October.

⁵³ Article 17, n. 3, Decree of Minister of Justice No. 1112/2005, 28 October.

⁵⁴ Article 7, n. 3, Decree of the Secretary of State of Justice No. 18778/2007, 13 July. Article 15, n. 3, Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

⁵⁵ Article 17, n. 5, Decree of Minister of Justice No. 1112/2005, 28 October (Justice for the Peace); Article 7.º, n. 2, Decree of the Secretary of State of Justice No. 18778/2007, 13 July (Family Mediation); Article 15.º, n. 3, Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January (Criminal Mediation).

2.2.3. Fees

In private mediation, there are no rules concerning fees: fees may be freely established.

In Courts for the Peace mediation services, the fees are € 25 for the Pre-Mediation session⁵⁷, € 0,35 per kilometre between the professional domicile of the mediator and the location of the Court for the Peace and the value of paid tolls⁵⁸, € 110 if a settlement is achieved and € 90 if the parties did not reach an agreement⁵⁹.

In family mediation services and labour mediation services, the fees are € 120 if a settlement is achieved, € 100 if the parties did not reach an agreement and € 25 if, despite the evidenced diligences and efforts of the appointed mediator, it was impossible to perform the mediation procedure⁶⁰.

2.2.4. Code of Conduct

There is no national 'Code of Conduct for Mediators'. However, the Portuguese administration adopted and translated the European Code of Conduct of Mediators, from the European Commission. Therefore, the supervision of mediators' activity is referenced to that Code⁶¹.

2.3. PROCEDURE OF MEDIATION: BASIC PRINCIPLES, VENUE, TIME LIMITS...

2.3.1. Legal principles and the role of the mediator

Regarding public mediation services, several legal principles are established in Portuguese legislation⁶²: the principles of private resolution of the dispute, physical attendance of the parties, informality, confidentiality, freedom of accepting mediation (there isn't mandatory mediation) and impartiality and independence of the mediator.

⁵⁷ As explained further, the litigious parties in a Court for the Peace attend a pre-mediation session, where a mediator explains the purposes and nature of mediation proceedings. Article 1 Decree of Secretary of Justice No. 22312/2005 (2nd serie), 14 October.

⁵⁸ Article 3 and 6 Decree of Secretary of Justice No. 22312/2005 (2nd serie), 14 October.

⁵⁹ Article 8 Decree of Secretary of Justice No. 22312/2005 (2nd serie), 14 October.

⁶⁰ Article 10 Article 6 Decree of Secretary of State of Justice No. 18778/2007, 13 July; Article 4 of Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006.

⁶¹ A. Soares da Costa e M. Samúdio Lima, *supra* n. 2, 195.

⁶² Article 35 Law No. 78/2001, 13 July.

There is a strict confidentiality rule in mediation: all content of mediation sessions is confidential and cannot be used in court, whether it is a private mediation or the result of public mediation services⁶³. The Courts for the Peace mediation legal regime extensively repeats this rule⁶⁴ and, in these mediation services, parties shall sign a confidentiality agreement prior to mediation⁶⁵.

The use of mediation is limited: in private law, mediation is not usable for rights and obligations that are not at the parties' disposal⁶⁶; in criminal law, it cannot result in measures that restrict the defendant's freedom, which affront the defendant's dignity or last for more than 6 months⁶⁷.

The mediator is an impartial and independent party, with no enforcing powers, who must create conditions for the parties to develop their own solution. Therefore, the mediator will not suggest a solution: he or she will organise and conduct the proceedings, asking questions and investigating the facts, so that the parties may freely commit to a fair outcome of their content⁶⁸.

⁶³ Article 249-C Portuguese Civil Procedure Code: 'Except for the agreement, the content of mediation sessions is confidential and cannot be used as evidence in court, except in exceptional circumstances, in particular the protection of physical or psychological integrity of any person'.

⁶⁴ Article 52, n. 2 and n. 3 Law No. 78/2001, 13 July: 'The parties, their legal representatives and the mediator shall keep confidentiality of all declarations enunciated in mediation proceedings. The parties shall not have access to the documents written by the mediator'; Article 13 Decree of Minister of Justice No. 1112/2005, 28 October: 'The confidentiality obligation concerns all the information regarding the content of mediation proceeding and can only be breached for protecting the physical or psychological integrity of someone'.

⁶⁵ Article 52, n. 1, Law No. 78/2001, 13 July: 'The parties must sign, in advance, a mediation agreement, under which assume that mediation is confidential'.

⁶⁶ Article 16, n. 3, Law No. 78/2001, 13 July (Justice for the Peace Mediation); Article 1 Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006 (Labour Mediation System); Article 4 Decree of the Secretary of State of Justice No. 18778/2007, 13 July (Family Mediation System); Article 1249 Portuguese Civil Code (Private Mediation).

⁶⁷ Article 6, n. 2, Law 21/2007, 12 June.

⁶⁸ This is widely expressed in Portuguese Law: Article 35 Law No. 78/2001, 13 May (concerning Courts for the Peace Mediation Services): 'The mediator is an impartial and independent third party, who has no powers to enforce a solution. The mediator is responsible for organising and conducting the mediation proceedings, using his or her theoretical knowledge and life experience in benefit of the people who asked for mediation services. Mediator shall try to accomplish the best and fairest useful agreement satisfying both parties'; Article 16 Decree of Minister of Justice No. 1112/2005, 28 October (concerning Courts for the Peace Mediation Services): 'Mediator cannot suggest or enforce a solution to the parties; he shall aid them to communicate, asking questions and investigating the subjects in order to help the parties to create options for a fair, equitable and lasting agreement, freely accomplished'; Article 7 Decree of the Secretary of State of Justice No. 18778/2007, 13 July (concerning family mediation services): 'The mediator is a specialised professional, who acts with no enforcing powers in a neutral and impartial way, clarifying the parties about their rights and duties to the mediation proceeding. If parties agree, he or she will carry out the mediation proceeding in the sense of a fair and equitable agreement, which ends the dispute'; Article 14 Regulation

2.3.2. Venue

In private mediation, there are no rules on this matter: the parties freely determine the venue.

The venue is legally determined, however, in public mediation services. Mediation proceedings within Courts for the Peace mediation services take place in the Court for the Peace⁶⁹; mediation proceedings within family mediation services may take place in any suitable location, provided by any public or private entity or by the parties⁷⁰; mediation proceedings within labour mediation services may take place in specially arranged locations or in suitable existent structures, such as public services, arbitration centres or Courts for the Peace⁷¹; mediation proceedings within criminal mediation services take place in Courts for the Peace facilities or, if necessary, the Government may provide other locations⁷².

2.3.3. Duration and time limits

In private mediation, parties may define the rules for mediation proceedings; therefore, there is no mandatory time limit. However, it must be emphasised that, if a judicial action is suspended for mediation proceedings by will of the parties⁷³, the maximum suspension period is 6 months⁷⁴.

In public mediation services – beyond general rules applicable to private mediation – there are special norms regarding mediation proceedings' duration and time limits. Therefore, within Courts for the Peace mediation services, the mediator has full power to decide the duration of mediation process⁷⁵; within

of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January (Criminal Mediation): 'The criminal mediator cannot suggest or enforce the terms of the agreement; he or she shall aid the parties to communicate and reflect over the dispute, helping them to consider options to a fair, equitable and lasting agreement, freely accomplished'.

⁶⁹ Article 51, n. 3, Law No. 78/2001, 13 July.

⁷⁰ Article 2, n. 2, Decree of the Secretary of State of Justice No. 18778/2007, 13 July.

⁷¹ Article 4 e) Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006.

⁷² Article 8 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

⁷³ Article 279-A, n. 1 and n. 2, Portuguese Civil Procedure Code: 'At any stage of the cause, and whenever deemed appropriate, the judge may refer the case to mediation, suspending the proceedings, unless either party expressly opposes such a referral; Notwithstanding the preceding paragraph, the parties may agree to solve the dispute by mediation, deciding the suspension of judicial proceedings for the maximum period mentioned in paragraph 4 of the preceding Article'.

⁷⁴ Article 279, n. 4, Portuguese Civil Procedure Code.

⁷⁵ Article 53 Law No. 78/2001, 13 July: 'The mediator shall evaluate the success of mediation sessions and decide of its continuation. He shall lead the proceedings trying to conclude them in an acceptable period of time, according to the complexity and nature of the dispute'.

labour mediation services, there is a time limit of three months, except if the parties expressly renew their will to mediate and if the mediator agrees to the proceedings' extension⁷⁶; within criminal mediation services, there is a time limit of three months, except if the mediator believes there is a strong possibility of an agreement – in this case, the mediator will ask the State Attorney for an extension, in a maximum of 2 months⁷⁷.

2.4. THE MEDIATOR AND JUDICIAL AND NON-JUDICIAL AUTHORITIES

2.4.1. Mediation and national courts

Prior to any mediation proceedings, national courts play a role in promoting the use of that device of dispute resolution, which is visible in several rules. On the one hand, costs of judicial proceedings are aggravated if the parties could have submitted their dispute to ADR yet did not do so⁷⁸; secondly, if parties decide to submit their dispute to mediation in any approved mediation service, limitation and prescription periods are suspended⁷⁹; thirdly, in any civil dispute, parties may decide to suspend the judicial proceedings and submit the case to mediation proceedings⁸⁰.

Additionally, judicial authorities may induct mediation: in any civil dispute, the Judge may decide to suspend judicial proceedings and refer the case to mediation⁸¹; in judicial processes regulating parental responsibilities, the Court may transmit the cause to mediation services (if an agreement is achieved, the

⁷⁶ Article 4 g) Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006.

⁷⁷ Article 9 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice No. 68-C/2008, 22 January.

⁷⁸ Generally, the winning party does not pay a share of the court fees. If the petitioner could have used any ADR and didn't do so, he will pay that share even in case of success. Article 447-D, n. 4, Portuguese Civil Procedure Code: '4 – The suitor that, having the possibility to use structures of alternative dispute resolution, opts for resorting to judicial proceedings, supports the expense of his party costs regardless of the outcome of the action, unless the opposing party has made impossible the use of alternative means of resolving the dispute'.

⁷⁹ Article 249-A of the Portuguese Civil Procedure Code: 'The use of pre-judicial mediation systems approved by the Minister of Justice shall suspend the limitation and prescription periods from the date it is requested the intervention of a mediator'.

⁸⁰ Article 279-A, n. 2, Portuguese Civil Procedure Code: 'Notwithstanding the preceding paragraph, the parties may agree to solve the dispute by mediation, deciding the suspension of judicial proceedings for the maximum period mentioned in paragraph 4 of the preceding Article'.

⁸¹ Article 279-A, n. 1, Portuguese Civil Procedure Code: 'At any stage of the cause, and whenever deemed appropriate, the judge may refer the case to mediation, suspending the proceedings, unless either party expressly opposes such a referral'.

Court ratifies it)⁸²; in a judicial divorce procedure, parties are informed of the existence and purposes of family mediation services⁸³; in judicial processes concerning crimes committed by children under 16 years old, the parties are encouraged to find a solution using mediation procedures.

After the mediation procedure, national courts may be asked to ratify the mediation settlement, in order to guarantee its accordance with applicable legislation⁸⁴.

2.4.2. Mediation and non-judicial authorities

A relationship can be established between mediation proceedings and Public Notaries and Civil Registrars. Public notaries may provide private mediation services⁸⁵; in divorce proceedings, civil registrars shall inform the spouses of the existence and purposes of family mediation services⁸⁶.

2.5. THE FAILURE OF MEDIATION: MEANING AND CONSEQUENCES

The failure of mediation means the parties did not achieve a settlement or quitted the mediation procedure.

No consequences arise for the parties: they can still solve the dispute in Court or in any other ADR. Therefore, if a judicial proceeding was suspended because of the mediation, it will resume⁸⁷; if a judicial proceeding was not in progress the limitation and prescription periods resume⁸⁸. Further, the mediator is not held

⁸² Article 147-D OTM: 'At any stage of the cause and whenever it is considered appropriate, in particular on parental responsibility regulation, the Judge may determine the intervention of public or private mediation, ex officio with the consent of the parties, or at their request'. In this case, mediation is free of any charge. Cf. Article 6 Decree of Secretary of State of Justice No. 18778/2007, 13 July.

⁸³ Article 1774 Portuguese Civil Code: 'Before the beginning of divorce proceedings, the Civil Registrar or the Court must inform the spouses of the existence and objectives of family mediation services'.

⁸⁴ Article 249-A, n. 3, Portuguese Civil Procedure Code: 'The judicial ratification of the agreement reached in pre-judicial mediation is intended to verify its compliance with legislation'.

⁸⁵ Article 4 m) of the Statute of Notaries (version of Law No. 15/2011, 25 January).

⁸⁶ Article 1774 Portuguese Civil Code: 'Before the beginning of divorce proceedings, the Civil Registrar or the Court must inform the spouses of the existence and objectives of family mediation services'.

⁸⁷ Article 279-A, n. 3, Portuguese Civil Procedure Code: 'Noting the impossibility of mediation agreement, the mediator informs the court, preferably electronically; the proceedings resume automatically without any act of the judge or of the secretary'.

⁸⁸ Article 249-A, n. 3 and n. 4 Portuguese Civil Procedure Code: '3 – The limitation and prescription periods resume the moment one of the parties refuses to continue the mediation

responsible for the failure of mediation proceedings⁸⁹, although in public mediation services, this produces an effect on the mediator's fees⁹⁰.

2.6. SUCCESSFUL MEDIATION AND THE MEDIATION AGREEMENT: FORMAL REQUIREMENTS, EFFECTS AND ENFORCEABILITY

2.6.1. Meaning and formal requirements

The success of the mediation procedure means parties decided to end their dispute, concluding an agreement (binding contract). Although Portuguese contract law is oriented by the principle of freedom to choose any form⁹¹, the mediation settlement is mandatorily submitted to written form⁹².

2.6.2. Effects and enforceability of mediation settlements

Mediation settlements achieved within Court for the Peace mediation services are written, signed by the parties and immediately ratified by the Judge for the

process, as well as when the mediator determines the end of the mediation process. 4 - 'The lack of agreement and refusal to continue mediation referred in the preceding paragraph shall be upheld by mediation services'.

⁸⁹ Article 16, n. 3, Decree of Minister of Justice No. 1112/2005, 28 October: 'Except in case of intentional fault, the mediator cannot be held responsible, by any party, for acts and omissions related to the mediation, as long as they are according with ethical rules, norms agreed by the parties and the mediation regulation'.

⁹⁰ In a Court for the Peace mediation services, according to Article 8, Decree No. 22312/2005 (2nd serie), 14 October, the mediator is paid (besides transport expenses) € 110 in case of achieving an agreement and € 90 if it fails; in family mediation services, Article 10 Decree No. 18 778/2007 establishes the payment of € 120 in case of successful mediation and € 100 in case of failure; in labour mediation services, Article 4 of Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006, establishes the payment of € 120 in case of successful mediation and € 100 in case of failure.

⁹¹ Article 219 Portuguese Civil Code: 'The validity of a contract is not dependent on observance of special form, except when the law requires it'.

⁹² Cf. Article 1250 Portuguese Civil Code: 'Notwithstanding the provisions of special laws, the preventive or non-judicial transaction must be formalised on public document or authenticated private document, when it can derive some purpose for which one of these forms is required, or on written document, in other cases'. This rule is repeated in other legal provisions regarding mediation. Article 56 Law No. 78/2001, 13 July: 'If parties achieve an agreement, it will be written and signed by the parties and the mediator, for immediate ratification by the Judge for the Peace, valuing as a Court decision'; Article 279-A, n. 5, Portuguese Civil Procedure Code: 'Mediation settlements shall be referred to Court, preferably electronically, following the terms defined for the transaction'; Article 300 Civil Procedure Code: 'The confession, withdrawal or transaction may be achieved by authentic public document or private written document, according to the formal requirements of substantive law'.

Peace, amounting to decisions of the Court for the Peace⁹³. A decision of the Court for the Peace is legally equivalent to a ruling of a formal national Court⁹⁴. Therefore, the agreement is mandatory and can be enforced in any Court, ending the dispute the same way a judicial decision would.

Other mediation settlements form a mandatory transaction contract⁹⁵ that modifies, extinguishes or creates rights. It is enforceable in Court whenever one of the parties assumes or recognises the obligation to pay a sum, to hand over something or to perform an action⁹⁶. If formalised in a public document, future obligations are also enforceable⁹⁷. If used prior to a civil dispute (pre-judicial mediation), settlements may be referred to Court for ratification⁹⁸, which could be useful when the settlement does not fulfil the requirements for constituting the base of execution proceedings or when the parties want to execute the agreement in other European States⁹⁹.

The achievement of a mediation settlement can generate other effects upon national courts: in fact, if there was a judicial proceeding in national courts, the settlement ends it¹⁰⁰. In this case, mediation settlements shall be referred to Court¹⁰¹.

It should be emphasised that mediation settlements do not make the mediator responsible for their compliance or for his or her acts in relation to the

⁹³ N. 1 of Article 56 Law No. 78/2001, 13 July.

⁹⁴ Article 61 Law No. 78/2001, 13 July.

⁹⁵ Article 1248 Portuguese Civil Code: 'Transaction is a contract by which the parties prevent or end a dispute through reciprocal concessions'.

⁹⁶ Article 46 Portuguese Civil Procedure Code: 'The execution proceeding shall be based on: [...] c) Written documents, signed by the debtor, importing the establishment or recognition of pecuniary obligations, which amount is determinable by simple arithmetic calculation in accordance with its provisions, or the obligation to hand over something or to perform an action'.

⁹⁷ If the agreement is formalised in public document (or authenticated private document), future obligations can also be enforced, according with Article 50 Portuguese Civil Procedure Code: 'Public documents or authenticated documents, where parties agreed to provide future benefits or future obligations may provide the basis for execution, if it is proven by a document issued in accordance with the provisions contained therein or covered by enforceable document, that some provision was made for completion of the business or any duty that was formed'.

⁹⁸ Article 249-A, n. 3, Portuguese Civil Procedure Code: 'The judicial ratification of the agreement reached in pre-judicial mediation is intended to verify its compliance with legislation'.

⁹⁹ This is the opinion of Dário MOURA VICENTE, *supra* n. 2, p. 116.

¹⁰⁰ Cf. Portuguese Civil Procedure Code, Article 293 ('It is permitted to the parties, in any instance, to compromise on the cause') and Article 287 ('The dispute ends by: [...] d) The withdrawal, confession or transaction;').

¹⁰¹ Article 279-A, n. 5, Portuguese Civil Procedure Code: 'Mediation settlements shall be referred to Court, preferably electronically, following the terms defined for the transaction'.

mediation¹⁰²; however, in public mediation systems, the success of mediation affects the mediator's fees.

There are no specific rules concerning the addition of mediation settlements to public registries. However, the mediation settlement is of the nature of a transaction contract¹⁰³, able to generate effects accessible to public registries, if formalised correctly¹⁰⁴. Therefore, as an example, if parties end their dispute over an inheritance establishing the distribution of land property and if they formalise the settlement on a public document, this contract may be logged on the Land Registry.

2.7. COSTS AND AVAILABILITY OF LEGAL AID

As regards private mediation, there are no rules concerning costs: they may be freely established.

The costs for using public mediation services are fully regulated in legislation, though: each party pays € 25 for Courts for the Peace mediation services (out-of-Court mediation)¹⁰⁵; concerning family mediation services and labour mediation services, there is a fee of € 50 for each party (however, mediation is free when the case was submitted to mediation by a decision of a Judge)¹⁰⁶; the use of criminal mediation services is free of charge¹⁰⁷.

Parties who cannot afford the costs will not pay the mediation costs, as the legal aid system can be used for public mediation services¹⁰⁸. However, there is no legal aid for private mediation.

¹⁰² Article 16, n. 3, Decree of Minister of Justice No. 1112/2005, 28 October: 'Except in case of intentional fault, the mediator cannot be held responsible, by any party, for acts and omissions related to the mediation, as long as they are according with ethical rules, norms agreed by the parties and the mediation regulation'.

¹⁰³ Article 1248 Portuguese Civil Code: 'Transaction is a contract by which the parties prevent or end a dispute through reciprocal concessions'.

¹⁰⁴ Article 1250 Portuguese Civil Code: 'Notwithstanding the provisions of special laws, the preventive or non-judicial transaction must be formalised on public document or authenticated private document, when it can derive some purpose for which one of these forms is required, or on written document, in other cases'.

¹⁰⁵ Order of Secretary of State of Justice No. 8386/2002 (2nd serie), 27 March.

¹⁰⁶ Article 6 Decree of Secretary of State of Justice No. 18778/2007, 13 July and Article 4.º c) of the Agreement between Ministry of Justice, Labour Unions and Industry Associations, 5 May 2006.

¹⁰⁷ Article 13 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice n. 68-C/2008, 22 January.

¹⁰⁸ Article 9 and annex I of Decree of Ministry of Justice No. 10/2008, 3 January.

3. COURT-ANNEXED MEDIATION

3.1. LEGAL BASIS AND AREAS OF LAW COVERED

Court-annexed mediation is possible when a dispute is submitted to special Courts – the Courts for the Peace. As explained above, Courts for the Peace are informal public Courts established with local authorities. Parties can freely submit civil disputes with a value inferior to € 5000 (excluding family and succession disputes) to a Court for the Peace¹⁰⁹. This court has a Judge (who does not decide exclusively by legality criteria) and mediation services.

The legal basis for this kind of mediation can be found in Law No. 78/2001, 13 July (which establishes the public network of Courts for the Peace and rules its proceedings, embracing mediation as a part of the Court procedure) and Decree of Minister of Justice No. 1112/2005, 28 October – which regulates mediation services within the Courts for the Peace.

There is a list of civil disputes with a value inferior to € 5,000 which may be solved in the Courts for the Peace (which involve mediation): actions to enforce obligations (except the ones where the creditor is or was a corporation); actions to enforce the hand out delivery of mobile property; disputes related to condominium regimes; disputes between land owners related to passage, waters, windows, trees and constructions; land property actions; contractual and non-contractual liability and restitution in damages for some criminal offences.

3.2. APPOINTMENT OF THE MEDIATOR AND VENUE

When the parties decide to submit their dispute to mediation procedure, the secretary of the Court for the Peace assigns a mediator from its list, alphabetically. Though, the parties may choose a mediator from the public list¹¹⁰. Mediators included on lists are recruited by open tender and are included in public lists of mediators, published in an official journal (Diário da República) and there is a list of mediators for each Court for the Peace¹¹¹.

Mediation proceedings take place in the Court for the Peace¹¹².

¹⁰⁹ It is firm that the competence of Courts for the Peace is not exclusive: the common Courts are also competent for the disputes admissible in Courts for the Peace. Ruling of the Supreme Court of Justice n. 11/2007, 24 May 2007. A controversial question is whether the accused may refuse to be judged in a Court for the Peace and demand that the cause is submitted to a common court. Cf. M. Teixeira de Sousa, 'A competência dos julgados...', 57.

¹¹⁰ Article 3, n. 4, Decree of Minister of Justice No. 1112/2005, 28 October.

¹¹¹ There is a public network of Courts for the Peace in all national territory.

¹¹² Article 51, n. 3, Law No. 78/2001, 13 July.

3.3. ORGANISATION OF THE MEDIATION PROCEDURE

The Court for the Peace is a real national court, which comprises mediation services: trying voluntary mediation is one of the steps of the procedure of these courts.

Once a cause is started, a Pre-Mediation Session takes place, conducted by a specialised mediator. This session aims to explain the mediation process to the parties and check the parties' suitability for solving their dispute by mediation¹¹³. In this session, parties will decide if they want to try to solve their cause by mediation or if they will assign the dispute to the Judge for the Peace.

If they opt for mediation, they will choose one mediator from the public lists available (if not, the Court for the Peace will assign one authorised mediator, alphabetically). The decision to opt for mediation is reversible at any time¹¹⁴. In the event of quitting the mediation procedure (or not accepting the use of mediation), the dispute will be decided by the Judge for the Peace¹¹⁵. This decision has the same value as the decisions of every other formal national court¹¹⁶.

After successful mediation proceedings, the settlement is presented to the Judge for the Peace for ratification. It then takes the value of a Court decision¹¹⁷. There are no rules concerning the cases to which the judge may deny ratification, causing doctrinal controversy.

Throughout the mediation procedure, lawyers or solicitors may accompany the parties¹¹⁸. However, the physical presence of the parties is mandatory in mediation sessions.

3.4. RELATIONS WITH JUDICIAL AND NON-JUDICIAL AUTHORITIES

This kind of mediation (court-annexed within a Court for the Peace) is one of the steps of the judicial procedure of the Courts for the Peace, which is part of national jurisdiction. Additionally, if mediation succeeds, the settlement will take the form of a judicial decision. Therefore, this court-annexed mediation is taken in the same way as any judicial procedure by other courts. This means that

¹¹³ Article 49 and 50 Law No. 78/2001, 13 July.

¹¹⁴ Article 51 Law No. 78/2001, 13 July.

¹¹⁵ Article 56 Law No. 78/2001, 13 July.

¹¹⁶ Article 61 Law No. 78/2001, 13 July.

¹¹⁷ Article 56 Law No. 78/2001, 13 July.

¹¹⁸ Article 38 Law No. 78/2001, 13 July.

if the same dispute is submitted in another court, the outcome will be an incident of *lis pendens* or *res iudicata*.

In regard to non-judicial authorities, this court-annexed mediation is taken as any judicial procedure by other national authorities: the settlement is held as a court ruling, obliging public notaries, registrars and any other public authority.

3.5. THE FAILURE OF MEDIATION: MEANING AND CONSEQUENCES

If the parties do not achieve a settlement, the Judge for the Peace will decide the dispute¹¹⁹. This decision has the same value as the decisions of every other formal national court, although it may be made not only according to legality criteria¹²⁰.

3.6. THE SUCCESS OF MEDIATION: THE MEDIATION AGREEMENT, FORMAL REQUIREMENTS, EFFECTS AND ENFORCEABILITY

The success of the mediation procedure means parties decided to end their dispute, agreeing on its resolution¹²¹. The mediator has full power to decide the duration and time limits of the mediation process¹²².

This settlement shall be formalised in writing and shall be signed by all the participants (parties and mediator). Then, it shall be presented to the Judge for the Peace for ratification¹²³, valuing as a decision of the Court for the Peace¹²⁴; the decision of a Court for the Peace has the same importance as a ruling of a formal Court¹²⁵. Therefore, the settlement is mandatory for the parties and can be enforced in any Court¹²⁶, ending the dispute the same way a judicial decision would.

¹¹⁹ Article 56 Law No. 78/2001, 13 July.

¹²⁰ Article 61 Law No. 78/2001, 13 July.

¹²¹ Article 56 Law No. 78/2001, 13 July.

¹²² Article 53 Law No. 78/2001, 13 July: 'The mediator shall evaluate the success of mediation sessions and decide of its continuation. He shall lead the proceedings trying to conclude them in an acceptable period of time, according to the complexity and nature of the dispute'.

¹²³ Article 56 Law No. 78/2001, 13 July: 'If parties achieve an agreement, it will be written and signed by the parties and the mediator, for immediate ratification by the Judge for the Peace, valuing as a Court decision'.

¹²⁴ N. 1 of Article 56 of Law No. 78/2001, 13 July.

¹²⁵ Article 61 of Law No. 78/2001, 13 July.

¹²⁶ Article 46, a), Portuguese Civil Procedure Code: 'The execution proceeding shall be based on: a) Court decisions [...]'.
b) Court decisions [...].

The second effect is the reduction of judicial costs: as seen before, if a settlement is achieved by mediation procedure, the cost of diminishes. Consequently, the difference will be returned to the parties¹²⁷.

The mediation settlement does not hold the mediator responsible for its compliance or for his or her acts in relation to the mediation¹²⁸. The success of mediation, though, influences the mediator's fees¹²⁹.

3.7. COSTS AND AVAILABILITY OF LEGAL AID

The procedure is perpetrated with the principle of low-cost: the use of Courts for the Peace as an alternative to regular national courts shall be economical. Within the judicial procedure, a solution achieved by mediation procedure shall be even more inexpensive. Therefore, each party supports the cost of € 70 for submitting a dispute to a Court for the Peace; if a settlement is achieved by mediation procedure, the cost drops to € 50.¹³⁰

Parties who cannot afford to do so, will not pay the mediation costs: legal aid is available¹³¹.

¹²⁷ Article 7 Decree of Minister of Justice No. 1456/2001, 28 December.

¹²⁸ Article 16, n. 3, Decree of Minister of Justice No. 1112/2005, 28 October: 'Except in case of intentional fault, the mediator cannot be held responsible, by any party, for acts and omissions related to the mediation, as long as they are according with ethical rules, norms agreed by the parties and the mediation regulation'.

¹²⁹ According to Article 8 Decree No. 22312/2005 (2nd serie), 14 October, the mediator is paid (besides transport expenses) € 110 in case of achieving an agreement and € 90 if it fails.

¹³⁰ Article 1 and 7 Decree of Minister of Justice No. 1456/2001, 28 December.

¹³¹ Article 9 and annex I of Decree of Ministry of Justice No. 10/2008, 3 January.

ROMANIA

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